IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 7, 2004

STATE OF TENNESSEE v. PATRICIA SUDBERRY BUTLER

Appeal from the Criminal Court for Bedford County
No. 15250 Charles Lee, Judge

No. M2003-01822-CCA-R3-CD - Filed August 2, 2004

The defendant, Patricia Sudberry Butler, entered pleas of guilty to two counts of the sale of more than .5 grams of cocaine, two counts of the delivery of more than .5 grams of cocaine, one count of the sale of less than .5 grams of cocaine, and one count of the delivery of less than .5 grams of cocaine. See Tenn. Code Ann. § 39-17-417. The convictions for the delivery of cocaine were merged into the accompanying convictions for the sale of cocaine. The trial court imposed sentences of eight years for the first conviction of the sale of more than .5 grams of cocaine, eight years and nine months for the second conviction of the sale of more than .5 grams of cocaine, and four years for the conviction of the sale of less than .5 grams of cocaine. Because the sentences for the sale of more than .5 grams of cocaine were ordered to be served consecutively, the effective sentence is sixteen years and nine months. In this appeal, the defendant asserts that the sentence is excessive and that the trial court erred by denying an alternative sentence. The judgments of the trial court are affirmed.

Tenn. R. App. P. 3; Judgments of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which ALAN E. GLENN and ROBERT W. WEDEMEYER, JJ., joined.

Andrew Jackson Dearing, III, Assistant Public Defender (at trial), and Merrilyn Feirman, Nashville, Tennessee (on appeal), for the appellant, Patricia Sudberry Butler.

Paul G. Summers, Attorney General & Reporter; Kathy D. Aslinger, Assistant Attorney General; and Michael Randles and Ann Filer, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

On May 29, 2003, the defendant entered pleas of guilty to two counts of sale of more than .5 grams of cocaine, two counts of delivery of more than .5 grams of cocaine, one count of sale of less than .5 grams of cocaine, and delivery of less than .5 grams of cocaine. The stipulated facts

presented at the plea submission hearing established that on June 13, 2002, officers of the 17th Judicial District Drug Task Force met with a confidential informant, who arranged to purchase 3.3 grams of crack cocaine from the defendant for $150. Later, the confidential informant purchased $100 worth of crack cocaine from the defendant. The Tennessee Bureau of Investigation (TBI) tested the substance bought by the confidential informant and determined it to be .8 grams of cocaine. Eleven days later, the confidential informant purchased $100 worth of crack cocaine from the defendant at her residence. TBI testing established that the substance contained .3 grams of cocaine. On the following day, the confidential informant arranged for an agent of the Drug Task Force to purchase 3.3 grams of crack cocaine from the defendant for $150. The agent traveled to the defendant's residence and gave her the money. Another individual picked up the cocaine. Testing established that the substance contained 1.2 grams of cocaine.

At the sentencing hearing, Laura Prosser, a presentence officer for the Board of Probation and Parole, testified that after the guilty plea, the defendant was directed to contact her office for an appointment. When she failed to do so, Ms. Prosser mailed the defendant's attorney an information packet setting the appointment. At 9:15 on the morning of the scheduled appointment, a secretary from the defendant's attorney's office telephoned Ms. Prosser, informing her that the defendant would not be able to come to her office until later that afternoon. Ms. Prosser agreed that the defendant could stop by anytime before 4:30 p.m. Because the defendant failed to appear and failed to set another appointment, Ms. Prosser was unable to obtain any current information regarding the defendant's employment, medical, or family history. Ms. Prosser did testify that the defendant still owed $925 in fines and costs for a 2002 conviction for simple possession of cocaine. The defendant, who had also been convicted of possession of drug paraphernalia, was placed on probation for that offense. Her probation was revoked eight months later. According to Ms. Prosser, the defendant also had convictions for criminal trespassing, driving on a revoked license, forgery, and child abuse by neglect. She stated that the defendant was on probation when the crimes at issue occurred.

Tim Miller, an agent with the Drug Task Force, testified that his unit had "made a number of controlled purchases of crack cocaine" from the defendant. He stated that only six weeks prior to the entry of the guilty pleas in this case, while the defendant was on bail, agents of the Task Force had purchased .4 grams of crack cocaine from her.

The thirty-nine-year-old defendant, testifying on her own behalf, admitted that she failed to attend her scheduled meeting with Ms. Prosser, explaining, "First of all I didn't know what I was going there for. . . . [S]econd of all, I didn't have [a] vehicle running." The defendant admitted that she had used crack cocaine on a regular basis for eight years prior to her arrest, acknowledging that she had "a bad problem" and needed help. She asked the trial judge to place her in a drug rehabilitation program because "I cannot help myself." During cross-examination, the defendant conceded that she failed to appear for court hearings in April and May of 2003. She acknowledged using crack on the day before the sentencing hearing and admitted that she sold illegal drugs in order to support her addiction.

In this appeal, the defendant asserts that the trial court erred by imposing consecutive sentences and by denying a community corrections sentence. When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597, 600 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

In calculating the sentence for a Class B, C, D, or E felony conviction, the presumptive sentence is the minimum in the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). If there are enhancement but no mitigating factors, the trial court may set the sentence above the minimum, but still within the range. Tenn. Code Ann. § 40-35-210(d). A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-210(e). The sentence must then be reduced within the range by any weight assigned to the mitigating factors present. Id.

In determining the defendant's sentence, the trial court first merged each of the convictions for delivery of cocaine into the convictions for the sale of cocaine and then applied enhancement factors (2), that the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range, and (9), that the defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community, to each of the convictions. See Tenn. Code Ann. § 40-35-114(2), (9) (2003). The court imposed sentences of eight years for the first conviction for sale of more than .5 grams of cocaine, a Class B felony, and eight years and nine months for the second. The statutory minimum is eight years for a Range I offender. See Tenn. Code Ann. § 40-35-112(a)(2). A sentence of four years was imposed for the conviction for sale of less than .5 grams of cocaine. The trial court denied alternative sentencing, observing that "as long as she continues to remain upon the streets of our community, she is going to sell cocaine to satisfy her addiction," adding that her "prospects of rehabilitation are not good." The trial court ordered the sentences for the sale of more than .5 grams of cocaine be served consecutively, for an effective sentence of sixteen years and nine months.

The defendant does not contest the application of the enhancement factors. The United States Supreme Court's recent opinion in Blakely v. Washington, 542 U.S. ___ , 124 S. Ct. 2531 (2004), however, calls into question the continuing validity of our current sentencing scheme. In that case, the Court, applying the rule in Apprendi v. New Jersey, 566 U.S. 466, 490 (2000), struck down a provision of the Washington sentencing guidelines that permitted a trial judge to impose an "exceptional sentence" upon the finding of certain statutorily enumerated enhancement factors. Id. The Court observed that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Id. at **13-14 (emphasis in original). Finally, the Court concluded that "every defendant has a right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." Id. at *31 (emphasis in original).

In any event, the application of enhancement factor (2) would not violate the rule established in Apprendi because that factor is based upon prior criminal convictions. Factor (9) was admitted by the defendant. See Apprendi, 566 U.S. at 490. One of the sentences imposed is at the minimum within the range, the second was enhanced by nine months, and the third, ordered to be served concurrently, was enhanced by one year. Under these circumstances, the terms imposed were justified under the rationale of Blakely.

The defendant contends that the trial court erred by imposing consecutive sentencing. Prior to the enactment of the Criminal Sentencing Reform Act of 1989, the limited classifications for the imposition of consecutive sentences were set out in Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). In that case, our supreme court ruled that aggravating circumstances must be present before placement in any one of the classifications. Later, in State v. Taylor, 739 S.W.2d 227 (Tenn. 1987), our high court established an additional category for those defendants convicted of two or more statutory offenses involving sexual abuse of minors. There were, however, additional words of caution:

> [C]onsecutive sentences should not routinely be imposed . . . and . . . the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved.

Taylor, 739 S.W.2d at 230. The Sentencing Commission Comments adopted the cautionary language. Tenn. Code Ann. § 40-35-115, Sentencing Commission Comments. The 1989 Act is, in essence, the codification of the holdings in Gray and Taylor; consecutive sentences may be imposed in the discretion of the trial court only upon a determination that one or more of the following criteria[1] exist:

[1]The first four criteria are found in Gray. A fifth category in Gray, based on a specific number of prior felony convictions, may enhance the sentence range but is no longer a listed criterion. See Tenn. Code Ann. § 40-35-115, Sentencing Commission Comments.

(1) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;
(2) The defendant is an offender whose record of criminal activity is extensive;
(3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
(4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
(5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
(6) The defendant is sentenced for an offense committed while on probation; or
(7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b).

The length of the sentence, when consecutive in nature, must be "justly deserved in relation to the seriousness of the offense," Tenn. Code Ann. § 40-35-102(1), and "no greater than that deserved" under the circumstances, Tenn. Code Ann. § 40-35-103(2); State v. Lane, 3 S.W.3d 456 (Tenn. 1999).

In this case, the trial court ordered consecutive sentences on the following grounds:

> I do not believe that the State has carried [its] burden that the defendant is a professional offender and that a large part of her livelihood is derived from criminal activity. But I do believe the State could be heard to argue that the defendant has a record of criminal activity [which] is extensive.
>
> The defendant has one prior felony conviction, several misdemeanor convictions. These three offenses and [in]numerable other uncharged but yet criminal activity that the defendant -- part of which the Court heard here today from Officer Miller and the defendant candidly admits that she has maintained her habit over the last seven or eight years by participating in criminal activity.

The defendant claims that the trial court erred by using uncharged conduct to determine that her record of criminal activity was extensive. This court has previously determined that a defendant's admission of criminal activity could be used to support a finding that his record of criminal activity was extensive. See State v. James F. Massengale, No. E2000-00774-CCA-R3-CD (Tenn. Crim. App., at Knoxville, Oct. 21, 2002) (record supported finding of extensive criminal activity where defendant admitted that he had stolen as many as one hundred fifty cars per year).

The defendant has ten prior convictions, including convictions for simple possession, criminal trespass, driving on a revoked license, forgery, child abuse and neglect, and four convictions for possession of drug paraphernalia. In addition, she admitted that she had been addicted to crack cocaine and had sold drugs as a means of satisfying her own cocaine addiction. Other proof established that while on bail on these charges, the defendant had sold cocaine to a confidential informant working for the drug task force. Under these circumstances, the record supports the trial court's determination that the defendant is an offender whose record of criminal activity is extensive. Moreover, the defendant committed the offenses in this case while on probation. In our view, the trial court did not err by imposing consecutive sentences.

The defendant also asserts that the trial court erred by denying a community corrections sentence. The purpose of the Community Corrections Act of 1985 was to provide an alternative means of punishment for "selected, nonviolent felony offenders in front-end community-based alternatives to incarceration." Tenn. Code Ann. § 40-36-103. The community corrections sentence provides a desired degree of flexibility that may be both beneficial to the defendant and serve legitimate societal aims. State v. Griffith, 787 S.W.2d 340, 342 (Tenn. 1990). Even in cases where the defendant meets the minimum requirements, the defendant is not necessarily entitled to a community corrections sentence as a matter of law or right. State v. Taylor, 744 S.W.2d 919 (Tenn. Crim. App. 1987). The following offenders are eligible for community corrections:

> (1) Persons who, without this option, would be incarcerated in a correctional institution;
>
> (2) Persons who are convicted of property-related, or drug/alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 13, parts 1-5;
>
> (3) Persons who are convicted of nonviolent felony offenses;
>
> (4) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;
>
> (5) Persons who do not demonstrate a present or past pattern of behavior indicating violence;
>
> (6) Persons who do not demonstrate a pattern of committing violent offenses.
>
> Persons who are sentenced to incarceration or on escape at the time of consideration will not be eligible.

Tenn. Code Ann. § 40-36-106(a).

The trial court denied the defendant's request for placement in the community corrections program, making the following observations:

> Even the State, I think, recognizes that the defendant's addiction plays a major role in her criminal activity.
>
> Mr. Dearing unfortunately is caught in a catch 22 when he also argues that if there is nothing apparently that can be done, then the only thing that can be done is

to isolate the defendant from others [and] her supply of crack cocaine so that she can not use that supply to spread it throughout our community.

The defendant has testified that she has gone through some type of rehabilitation program unsuccessfully.

I do not know of anything that I could do. Certainly the community corrections [program] [does not have] the facilities to care for an addiction of the magnitude that [the defendant] has.

So the community corrections argument is not a good one . . . . [A]s long as she continues to remain upon the streets of our community, she is going to sell cocaine to satisfy her addiction.

That leads the Court to the only conclusion it can make and that is that the defendant's prospects of rehabilitation are not good.

The consideration of community corrections is not a viable alternative.

Generally, standard offenders convicted of Class C, D, or E felonies are presumed to be favorable candidates "for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6). Although the defendant qualifies for a community corrections sentence, see Tenn. Code Ann. § 40-36-106, she is not entitled to a presumption in favor of such alternative sentencing because she was convicted of two Class B felonies, see Tenn. Code Ann. § 40-35-102(6). Further, as the trial court observed, incarceration is necessary in this instance to "protect society by restraining a defendant who has a long history of criminal conduct." Tenn. Code Ann. § 40-35-103(1)(A). The defendant has five prior convictions involving the use or possession of illegal drugs. She has also admitted selling drugs to support her own cocaine habit. The record demonstrates that "[m]easures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant." By our count, the defendant has been granted probationary sentences on at least four prior occasions and was on probation for another charge when she committed the offenses at issue. Her probation in two prior cases was revoked because she failed to pay the fines and costs associated with those charges, she engaged in other criminal activity, and she tested positive for illegal drugs. Under these circumstances, it is our view that the trial court did not err by denying the defendant's request for a community corrections sentence.

Accordingly, the judgments of the trial court are affirmed.

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GARY R. WADE, PRESIDING JUDGE